In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 904

ALINE P. WEISS AND ALICE K. POLLITZER,
APPELLANTS

v.

JOHN W. GARDNER, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, AND BERNICE L. BERNSTEIN, REGIONAL DIRECTOR OF DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

SUGGESTION OF MOOTNESS

Section 103(b)(1) of the Social Security Amendments of 1965, 79 Stat. 333, 42 U.S.C. (1965 Supp.) 426, note, prohibits the payment of certain medical and hospital insurance ("medicare") benefits to individuals who are members of organizations which are registered, or are under a final order to register, under the Subversive Activities Control Act of 1950 as Communist-action, Communist-front or Communist-infiltrated organizations. To administer this statutory provision, the Secretary of Health, Education, and Welfare has

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included in the form application for medicare benefits a statement, to be signed by the applicant, certifying that he is not a member of such an organization (J.S. App. 16–17).

Appellants instituted this action for a declaratory judgment and injunctive relief in the United States District Court for the Southern District of New York, challenging the constitutionality of Section 103(b)(1) and of the inclusion of the organizational membership disclaimer in the application form. The impanelment of a three-judge court was sought and granted (J.S. App. 31–36). A majority of the court, after hearing, dismissed the complaint on the ground that appellants lacked standing to challenge Section 103(b)(1) since, so far as appeared, they were not members of any organization enumerated in the statute and had not been denied benefits on that or any other ground (J.S. App. 16–21). Neither the court nor its dissenting member (J.S. App. 22–30) reached the merits of the constitutional challenge made by appellants. The judgment of the district court was entered on October 13, 1966 (J.S. App. 13–14), and a notice of direct appeal to this Court was filed on October 27, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

We are submitting this memorandum to advise the Court of circumstances which have occurred since the filing of appellants' Jurisdictional Statement and which, in our view, render the case moot. On November 14, 1966, a three-judge district court in the Central District of California, considering a similar

challenge to the constitutionality of Section 103(b)(1) and the disclaimer in the medicare application, issued an opinion in which it held that the statutory provision was unconstitutional and that a response to the statement could not be demanded of medicare applicants. *Reed* v. *Gardner,* No. 66–1224–TC Civil (J.S. App. 37–49). On December 5, 1966, that court entered a judgment in which it declared Section 103(b)(1) unconstitutional and permanently enjoined the Secretary of Health, Education and Welfare, his successors, and all persons acting pursuant to his direction and control from enforcing, operating under or executing Section 103(b)(1), from submitting to "persons covered by Section 103(a)" the "disclaimer or question pertaining to organizational membership such as appear" on the medicare application forms, and from investigating the organizational membership of medicare applicants (Appendix, *infra*).

The Solicitor General, on behalf and with the concurrence of the Secretary of Health, Education, and Welfare, has determined not to appeal the decision in *Reed* v. *Gardner.* Although the judgment in that case invalidates, on constitutional grounds, an Act of Congress—a result which ordinarily would warrant an appeal to this Court—we have concluded that the decision of this Court in *Elfbrandt* v. *Russell,* 384 U.S. 11, decided almost nine months after the enactment of Section 103(b)(1), forecloses any argument that the challenged provision is constitutional. This Court held in *Elfbrandt* that the State of Ari-

zona could not constitutionally bar from public-school employment any person who refused to swear that he would not knowingly become or remain a member of an organization one of whose purposes was the violent overthrow of the government so long as the State oath was not construed as requiring specific intent to further the organization's unlawful purposes and active membership in such organization. We recognize that the public policy in disqualifying all members of Communist organizations (whether or not they are active and adhere to the organizations' unlawful purposes) from receipt of medicare benefits must be deemed less substantial than was Arizona's interest in disqualifying such members from employment in the public schools.[1] Consequently, we feel that whatever litigable doubts may have existed regarding the constitutionality of Section 103(b)(1) at the time of its enactment have been resolved against its validity by this Court's subsequent decision in *Elfbrandt*.

The judgment in *Reed* v. *Gardner* declares Section 103(b)(1) unconstitutional and enjoins the Secretary of Health, Education, and Welfare from enforcing the provision anywhere in the United States *vis-à-vis* any applicant for medicare benefits. It therefore gives the appellants in this case all the relief which they seek in their complaint. Hence the only ques-

[1] Compare our views in *United States* v. *Robel*, No. 83, this Term, Brief for the United States, pp. 41–42. See, also, 20 U.S.C. 581(f)(4) and 42 U.S.C. 1874(d)(2). These statutes, like the one in *Robel*, implement a more substantial governmental interest in legislation of the kind involved here.

tion resolved by the court below—whether appellants had standing to challenge the statute and its application—is now moot. See *Taylor* v. *McElroy*, 360 U.S. 709; *Bryan* v. *Austin*, 354 U.S. 933; *United States* v. *Alaska S.S. Co.*, 253 U.S. 113; *Berry* v. *Davis*, 242 U.S. 468; cf. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36. Although we believe that the decision of the court below is correct, the Court may, in these circumstances, deem it appropriate to vacate the judgment below and remand the case to the district court with instructions to dismiss the complaint as moot. *E.g., United States* v. *Leiter Minerals, Inc.*, 381 U.S. 413; *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39.

Respectfully submitted.

THURGOOOD MARSHALL,
Solicitor General.

JANUARY 1967.

APPENDIX

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA

No. 66-1224-TC, Civil

ALDA T. REED, ON BEHALF OF HERSELF AND ALL PERSONS SIMILARLY SITUATED, PLAINTIFF

v.

JOHN W. GARDNER, AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DEFENDANT

JUDGMENT

(Filed December 5, 1966)

This cause came on regularly for trial on October 6, 1966 before the Hons. Walter Ely, Circuit Judge, Thurmond Clarke, Chief District Judge and E. Avery Crary, District Judge, constituting a three judge court convened pursuant to the provisions of 28 U.S.C. 2282 and 2284. A. L. Wirin, Fred Okrand and Laurence R. Sperber, Esqs. by A. L. Wirin and Fred Okrand appeared as counsel for plaintiff. Manuel L. Real, United States Attorney, Frederick M. Brosio, Jr., and M. Morton Freilich, Assistants United States Attorney, by M. Morton Freilich and Ruth Harwitz, Assistant Regional Counsel, Department of Health, Education and Welfare, appeared as counsel for defendant. The Court, sitting without a jury, made and entered its Findings of Fact and Conclusions of Law on November 14, 1966, in compliance with Rule 52(a),

Federal Rules of Civil Procedure. In accordance with said Findings of Fact and Conclusions of Law, IT IS ORDERED, ADJUDGED AND DECREED:

1. Section 103(b)(1) of the Social Security Amendments of 1965 (79 Stat. 333; note to 42 USCA 426) is unconstitutional;

2. The defendant, John W. Gardner, as Secretary of the United States Department of Health, Education and Welfare, his successors, and all persons acting pursuant to his direction and control, are permanently enjoined from enforcing, operating under or executing the provisions of said Section 103(b)(1), and from submitting to persons covered by Section 103(a) of the Social Security Amendments of 1965 (79 Stat. 333; note to 42 USCA 426) an Application for Hospital Insurance Entitlement containing a disclaimer or question pertaining to organizational membership such as appear on Social Security Administration Forms SSA–18 (8–65) and (9–65) and SSA–1497 (11–65), and from inquiring or investigating, or causing inquiry or investigation to be made, as to the organizational membership of plaintiff and all other persons who, without having answered said organizational disclaimer or question, have submitted Applications for Hospital Insurance Entitlement which contained such a disclaimer or question.

Dated at Los Angeles, California this 5th day of December, 1966.

WALTER ELY,
Circuit Judge.
THURMOND CLARKE,
Chief District Judge.
E. AVERY CRARY,
District Judge.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

WEISS ET AL. *v.* GARDNER, SECRETARY, HEALTH, EDUCATION & WELFARE, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 904. Decided February 13, 1967.

PER CURIAM.

The judgment of the court below is vacated and the case is remanded to the United States District Court for the Southern District of New York with instructions to dismiss the complaint as moot.